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No. 83-55

In the Supreme Court of the United States

OCTOBER TERM, 1983

RITA ARMILIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in a prosecution for making a false material statement in violation of 18 U.S.C. (& Supp. V) 1623, the trial court was required to submit the question of materiality to the jury.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A2-A8) is reported at 705 F.2d 939.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1983. The petition for a writ of certiorari was filed on July 1, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. (Supp. V) 1623(a) provides in pertinent part:

> Whoever under oath * * * in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other

material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted of making a false material statement before a grand jury, in violation of 18 U.S.C. (& Supp. V) 1623. She was fined $500 and sentenced to a one-year term of imprisonment, with all but six months suspended, to be followed by two years' probation. Pet. App. A1. The court of appeals affirmed. *Id.* at A2-A8.

The evidence adduced at trial is summarized in the opinion of the court of appeals. Briefly, it showed that on April 4, 1980, two police officers observed petitioner and Carl Civella, a convicted felon, in a car driven by Civella. The police followed the car to a specialty store, where, "from a close distance," one of the officers saw petitioner, in the company of Civella, purchase a .38 caliber handgun. When petitioner and Civella left the store, Civella was carrying a brown paper bag. The police followed them to petitioner's apartment and observed Civella enter the apartment carrying what appeared to be the same brown paper bag. Pet. App. A3-A4; Tr. 25-30, 43-44, 48-51.

Approximately a year and a half later, on August 26, 1981, petitioner appeared before a grand jury that was investigating whether Civella violated 18 U.S.C. 922(h) and 18 U.S.C. App. 1202(a), which prohibit the possession of a firearm by a convicted felon. Petitioner testified that Paul Varsalona, not Civella, had been with her in April 1980

when she bought the gun. Pet. App. A3-A4. Petitioner's perjury conviction was based on that testimony.[1]

The court of appeals affirmed. Pet. App. A2-A8. It rejected petitioner's arguments that the trial court had erred in not submitting the issue of materiality to the jury and that the evidence of materiality was insufficient. Specifically, the court noted that the courts have "long * * * held" that the issue of materiality is for the court and not the jury (*id.* at A4), and that petitioner's perjured testimony "certainly tended to impede or hamper the grand-jury investigation of whether Mr. Civella unlawfully possessed a firearm" (*id.* at A7).

ARGUMENT

Petitioner contends that the trial court erred in not submitting to the jury the question of the materiality of her false statements to the grand jury's investigation of Civella. She acknowledges (Pet. 15) that this Court has stated that the materiality of false testimony charged as perjury is a question of law to be decided by the court rather than the jury. See *Sinclair* v. *United States*, 279 U.S. 263, 298 (1929). Petitioner contends, however, that the rule articulated in *Sinclair* is no longer viable; in particular, she argues that the materiality of a false statement alleged to constitute a violation of 18 U.S.C. (& Supp. V) 1623 is an essential element of the crime and that a jury therefore must find materiality

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[1]The officers who had observed petitioner and Civella at the time the gun was purchased testified at petitioner's perjury trial that, as a result of prior investigative activities, they knew what Civella and Varsalona looked like and that there was no question that it was Civella and not Varsalona with petitioner when she purchased the gun. Tr. 31, 51-52. The evidence adduced at trial included a stipulation by the parties to the effect that the grand jury before which petitioner testified was investigating whether Civella had possessed a firearm. Pet. App. A4. The government also introduced the transcript of petitioner's entire grand jury testimony. *Ibid.*

beyond a reasonable doubt. This Court recently denied certiorari in a case presenting the same contentions. *Falco* v. *United States*, No. 82-882 (Apr. 4, 1983). Further review likewise is not warranted here.

Sinclair involved a challenge to a conviction under 2 U.S.C. 192, which imposes a penalty on any witness before a committee of Congress who refuses to answer "any question pertinent to the question under inquiry" by the committee. The Court rejected Sinclair's claim that the question he had refused to answer was not pertinent to any inquiry the committee was authorized to make. 279 U.S. at 296-298. The Court went on to hold that the question of pertinency had been "rightly decided by the court as one of law." *Id.* at 298. The Court observed that the question of pertinency was "not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. * * * [T]he materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court." *Ibid.* (citations omitted). The Court also noted that questions of pertinency were similar to those concerning relevancy of evidence, which were clearly matters of law to be decided by the court. *Ibid.* The Court concluded that the reasons for holding relevancy and materiality to be questions of law applied with equal force to the determination of pertinency and that it would be "incongruous and contrary to well-established principles to leave the determination of such a matter to a jury." *Id.* at 299 (citations omitted).

In concluding that materiality in the context of a perjury prosecution is a matter of law to be decided by the court rather than the jury, the Court in *Sinclair* articulated a principle of long standing in both federal and state courts. See, *e.g.*, Annot., 62 A.L.R.2d 1027 (1958) (citing numerous federal and state cases); Annot., 22 A.L.R. Fed. 379, 387-389 (1975) (citing cases brought under 18 U.S.C. 1621

and 1622). Contrary to petitioner's suggestion (Pet. 15), that rule continues to be a viable one. This Court has not retreated from its statements in *Sinclair*. In *Russell* v. *United States*, 369 U.S. 749, 755-756 (1962), the Court cited as a basic proposition its holding in *Sinclair* that pertinency under 2 U.S.C. 192 is a question to be determined by the court as a matter of law. The traditional rule with respect to materiality in a perjury prosecution continues to be followed in the federal courts and in the majority of state courts. See, *e.g.*, *United States* v. *Watson*, 623 F.2d 1198, 1201 (7th Cir. 1980) (describing rule as "well settled" in a case brought under 18 U.S.C. (& Supp. V) 1623); *United States* v. *Richardson*, 596 F.2d 157, 165 (6th Cir. 1979) (characterizing rule as "long settled" in a case brought under 18 U.S.C. (& Supp. V) 1623). As this Court noted in *Sinclair*, that rule is justified in view of the similarity between the issues of materiality in a perjury prosecution and relevance of evidence for purposes of admissibility in any legal proceeding, a matter that is decided by the court under our legal system.[2] The legislative history of 18 U.S.C. (& Supp. V) 1623 does not indicate that Congress intended to abandon the traditional rule in prosecutions under the statute. See *United States* v. *Watson*, *supra*, 623 F.2d at 1201 n.6.

Petitioner contends (Pet. 10-11) that various constitutional cases decided by this Court require abandonment of the traditional rule that materiality is a question of law to

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[2]Materiality may be a question of fact in some types of proceedings, such as prosecutions under certain fraud statutes. See, *e.g.*, *United States* v. *Halbert*, 640 F.2d 1000, 1007-1008 (9th Cir. 1981) (concluding that the failure to instruct the jury on materiality in a fraud prosecution under 18 U.S.C. 1341 and 1342 was harmless error). However, in the context of a perjury prosecution, in which the question is the materiality of a false statement or document to an issue in a legal proceeding, materiality normally is a matter of law.

be decided by the court in perjury cases. But the cases she cites do not dictate such a result. In *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), and *In re Winship*, 397 U.S. 358 (1970), the Court made clear that the prosecution is required to prove beyond a reasonable doubt "every fact necessary to constitute the crime" charged (421 U.S. at 685; 397 U.S. at 364). As the Court's language suggests, the "beyond a reasonable doubt" standard applies to questions of fact; it simply does not apply to, or even have any real meaning in connection with, questions of law.[3] Accordingly, those decisions are entirely consistent with the ruling below (Pet. App. A5) that "standards of proof for making findings of fact are * * * simply irrelevant to the determination of materiality."[4]

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[3]Similarly, in *Christoffel* v. *United States*, 338 U.S. 84, 89-90 (1949), the element of the crime of perjury before a congressional committee that the Court held was required to be proved beyond a reasonable doubt was an issue of fact, viz., whether a quorum of the committee had been present at the time of the alleged perjury.

[4]Nor do any of the court of appeals decisions cited by petitioner (Pet. 12-14) conflict with that ruling. Indeed, those cases hold, as did the court below, that the government has the burden of presenting evidence of the scope of the grand jury's investigation (such as a transcript of the grand jury proceedings or the testimony of the foreperson) for the *trial court* to consider in determining the issue of materiality. See, *e.g.*, *United States* v. *Byrnes*, 644 F.2d 107, 111 (2d Cir. 1981); *United States* v. *Berardi*, 629 F.2d 723, 727-728 (2d Cir.), cert. denied, 449 U.S. 995 (1980); *United States* v. *Giacalone*, 587 F.2d 5,7 (6th Cir. 1978), cert. denied, 442 U.S. 940 (1979). See also *United States* v. *Stassi*, 583 F.2d 122, 126 (3d Cir. 1978), aff'g 443 F. Supp. 661, 666 (D.N.J. 1977) (distinguishing review for error of district court's determination of materiality from review under the clearly erroneous standard of fact finding in a non-jury criminal case). Petitioner also contends (Pet. 12-14) that conflict exists within the Eighth Circuit. Even assuming such conflict exists, it is not a matter that calls for this Court's attention. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

Petitioner also contends (Pet. 13) that the decision below conflicts with the Ninth Circuit's decision in *United States* v. *Valdez*, 594 F.2d 725, 729 (1979). But *Valdez* involved a prosecution under 18 U.S.C. 1001, in which the court of appeals held that while the question of materiality should have been submitted to the jury, the failure to do so was not reversible error because the materiality of the false statements at issue was so clearly established. Hence, no conflict exists with respect to the determination of materiality under 18 U.S.C. (& Supp. V) 1623. Indeed, the Ninth Circuit has expressly held that in cases brought under that section materiality is a question of law to be decided by the court. See *United States* v. *Dipp*, 581 F.2d 1323, 1328 (9th Cir. 1978), cert. denied, 439 U.S. 1071 (1979); *United States* v. *Percell*, 526 F.2d 189, 190 (9th Cir. 1975).[5]

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[5]Petitioner argues (Pet. 15-19) that the Court should resolve a conflict between state and federal courts concerning whether materiality is a matter of law. She cites *Commonwealth* v. *McDuffee*, 379 Mass. 353, 398 N.E.2d 463 (1979), in which the Supreme Judicial Court of Massachusetts held that the element of materiality under a state perjury statute was a matter for the jury rather than for the court. See also *People* v. *Clemente*, 285 A.D. 258, 262, 136 N.Y.S.2d 202, 206 (1954), aff'd, 309 N.Y. 890, 131 N.E.2d 294 (1955) (construing New York perjury statute as requiring submission of materiality to jury). Of course, *McDuffee* did not address materiality under 18 U.S.C. (& Supp. V) 1623. In addition, *McDuffee* involved a false statement made to a government agency in a license renewal proceeding, not perjury committed during a trial or grand jury proceeding. Thus, it may be closer to a fraud-type case. See note 2, *supra*. *McDuffee* represents a minority view among the states. See *State* v. *Gallegos*, 98 N.M. 31, 32, 644 P.2d 545, 546 (Ct. App. 1982) (noting that all federal courts follow the traditional rule and that New York and Massachusetts are the only states that hold that materiality is a jury question in a perjury case). Because the issue is essentially statutory, and state courts do not try prosecutions brought under 18 U.S.C. (& Supp. V) 1623, there can be no conflict requiring resolution by this Court.

Even if petitioner were correct in her contention that it would be advisable to reconsider the well established rule that materiality is a question of law to be decided by the court in the context of a perjury prosecution, this case would not be an appropriate vehicle for such reconsideration, since submission of materiality to the jury could not conceivably have affected the outcome of her trial. As the court of appeals held (Pet. App. A7), petitioner's false testimony that she was with a man other than Civella when she purchased the firearm "certainly tended to impede or hamper the grand-jury investigation of whether Mr. Civella unlawfully possessed a firearm."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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